APPELLATE ADVOCACY FOR PROSECUTORS

November 16, 2018
Maricopa County Security Building
Phoenix, Arizona

LOWER COURT APPEALS AND DISCRETIONARY REVIEW: STRATEGIES AND PRACTICAL TIPS

Presented by:

ALICE JONES
Unit Chief Counsel, Office of the Attorney General

ANDREA KEVER
Deputy County Attorney, Maricopa County Attorney's Office

GARY SHUPE
Assistant Appeals Bureau Chief

Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 West Camelback Road, Suite 202
Phoenix, Arizona 85015

ELIZABETH ORTIZ
EXECUTIVE DIRECTOR

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

Presents

Appellate Advocacy for Prosecutors

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Gary L. Shupe
Assistant Appeals Bureau Chief
Phoenix City Prosecutor's Office
gary.shupe@phoenix.gov

I. Jurisdiction to appeal

A. Defendant's appeals

Article 2, § 24 of the Arizona Constitution guarantees a defendant's right to appeal: "In criminal prosecutions, the accused shall have the right . . . to appeal . . . .

Under A.R.S. § 13-4033(A), a defendant may appeal from:

- "A final judgment of conviction or verdict of guilty except insane";
- "An order denying a motion for a new trial";
- "An order made after judgment affecting the substantial rights of the party"; or
- "A sentence on the grounds that it is illegal or excessive."

See also A.R.S. § 22-371(A) ("The defendant in a criminal action may appeal to the superior court from the final judgment of a justice or municipal court.").

B. State's appeals

The State has no constitutional right to appeal. *State v. Moore*, 48 Ariz. 16, 18 (1936). The State may appeal only as authorized by statute: "in the absence of express legislative authority, [ ] the state lacks the ability to appeal in criminal matters." *State v. Dawson*, 164 Ariz. 278, 280 (1990). Arizona Revised Statute § 13-4032 allows the State to appeal from lower, or nonrecord, courts (i.e., justice courts or municipal courts). *Litak v. Scott*, 138 Ariz. 599, 601 (1984).

Section 13-4032 authorizes the State to appeal from:

> 1. An order dismissing an indictment, information or complaint or count of an indictment, information or complaint.
> 2. An order granting a new trial.
> 3. A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment.
> 4. An order made after judgment affecting the substantial rights of the state or a victim, except that the state shall only take an appeal on an order affecting the substantial rights of a victim at the victim's request.
> 5. A sentence on the grounds that it is illegal, or if the sentence imposed is other than the presumptive sentence authorized by § 13-702, § 13-703, § 13-704 or § 13-706, subsection A.
> 6. An order granting a motion to suppress the use of evidence.
> 7. A judgment of acquittal of one or more offenses charged in an indictment, information or complaint or count of an indictment, information or complaint that is entered after a verdict of guilty on the offense or offenses.

II. Appellate procedure

A. Dismissing the case to appeal?

The Supreme Court has held that the State should dismiss its case to pursue an appeal when challenging an order suppressing evidence. *State v. Lelevier*, 116 Ariz. 37, 38–39 (1977); *State v. Million*, 120 Ariz. 10, 14–15 (1978). Doing so, according to the Court, prevents a violation of the defendant's right to a speedy trial. *Lelevier*, 116 Ariz. at 38–39.

Rule 8 time doesn't run during an appeal. *State ex rel. McDougall v. Gerber*, 159 Ariz. 241, 242 (1988). And the statute of limitations is tolled during an appeal. *Lee v. Superior Court*, 173 Ariz. 120, 124 (App. 1992).

B. Applicable rules

The Arizona Superior Court Rules of Appellate Procedure–Criminal (SCRAP–Criminal, or simply SCRAP) generally govern. If no specific SCRAP rule applies, follow the appropriate procedure under Arizona Rule of Criminal Procedure (ARCrP) 31. SCRAP 1(b).

C. Notice of Appeal

A party initiates an appeal by filing a notice of appeal or of cross-appeal.

1. Time for filing

The notice of appeal must be filed within fourteen days of the order, judgment, sentence, or ruling to be challenged. SCRAP 4(a). The superior court has no jurisdiction to consider an appeal if the notice of appeal was untimely filed. *Dawson*, 164 Ariz. at 280, 792 P.2d at 743. This jurisdictional bar does not apply if the failure to file a timely notice wasn't the defendant's fault (i.e., counsel was at fault). *See* ARCrP 32.1(f).

Add five days to the fourteen-day limit if the ruling or order to be appealed from is mailed to the parties. *State v. Rabun*, 162 Ariz. 261, 263 (1989).

2. Contents

Notices of appeal must be written and specify the order, judgment, sentence, or ruling to be appealed from. SCRAP 3(a) and (b).

D. The record

For lower-court appeals (LCAs), the record on appeal consists of:

> (1) The notice of appeal;
> (2) The docket or list of events;
> (3) Documentation or record of payment of a fine, restitution, or posting of bond;
> (4) The charging document and any amendments;
> (5) Disposition or judgment or sentence; and
> (6) The order, judgment, or ruling that is the subject of the appeal.
>
> Unless otherwise designated by a party, the record shall also include:
> (7) Any written motions, responses, and replies;
> (8) Any exhibits (admitted or not);
> (9) The recording or certified transcript of the trial, as the Superior Court may require (except that voir dire, opening and closing argument, and jury instructions shall not be included unless designated by a party);
> (10) If designated for inclusion by a party, oral argument on motions, voluntariness, or suppression hearings; aggravation or mitigation hearings; probation violation proceedings; and the entry of judgment and sentence;
> (11) Any other matter designated by a party.

SCRAP 7(c).

Refer also to any applicable local rules for your particular superior court. Rule 9.4(b) of the Local Rules for Maricopa County Superior Court, for instance, requires that a transcript be created only when the record is ninety minutes or longer. Shorter records may consist of other approved methods of recording (i.e., audio or FTR audio). Whether the record consists of a transcript or other recording, parties must cite to the record in some "reasonable and understandable fashion." *Jordan v. McClennen*, 232 Ariz. 572, 575, ¶ 12 (App. 2013).

Some courts, like Phoenix Municipal Court, prepare the transcript or FTR audio recording for the parties and bill the appellant consistent with established rates. Phoenix Municipal Court contracts with an authorized transcription service. Other courts put the responsibility for securing a transcript *from an authorized transcriber* wholly on the appellant.

Unless specifically designated by a party, the record does not include *voir dire*, opening and closing arguments, jury instructions, oral argument on motions, suppression hearings, aggravation or mitigation hearings, probation-violation proceedings, or the entry of judgment and sentence. SCRAP 7(c)(9) and (10). Nor does the record include "determinations of release conditions, notices of appearance, discovery disclosures, notices of defenses, subpoenas, notices of pretrial or trial settings[,] MVD abstracts or other agency advisories, or general correspondence." SCRAP 7(f).

Ensure that the record includes *all* of the items you will need for the appeal. Use SCRAP 7(d) to designate necessary items that aren't automatically included in the record by SCRAP 7(c). The appellate court will presume that any missing portion of the record supports the trial court:

> It is within [each party's] control as to what the record on appeal will contain, and it is [each party's] duty to prepare the record in such a manner as to enable an appellate court to pass upon the questions sought to be raised in the appeal. Where matters are not included in the record on appeal, the missing portion of the record will be presumed to support the decision of the trial court. An appellate court will not speculate about the contents of anything not in the appellate record. In the absence of a record to the contrary, we must presume that the trial court acted properly . . . .

State v. Rivera, 168 Ariz. 102, 103 (App. 1990) (internal citations omitted).

E. Briefs

1. Time and place for filing

The deadline for the filing of the Appellant's opening brief is no later than seventy-four days from the order, judgment, sentence, or ruling to be appealed. This time period includes the fourteen days given to file the notice of appeal as well as the sixty days provided under SCRAP 8(a)(2). Part of this sixty days is used to prepare the transcript or recording for appeal. Brief writing begins once the record is received.

Appellees may file an answering brief or memorandum "within 30 calendar days of the filing date of the appellant's memorandum." SCRAP 8(a)(2). This deadline is based upon when the appellant *files* a memorandum with the trial court not upon when the appellee actually *receives* the appellant's memorandum.

Reply memoranda may only be filed with the permission of the superior court. SCRAP 8(a)(2).

Opening and answering briefs are filed in the trial court. SCRAP 8(a)(1) and (2). A reply memorandum, along with the accompanying request to file a reply, are filed in the superior court. SCRAP 8(a)(2).

2. Form, length, and contents

SCRAP 8(a) sets forth the form, length, and content requirements for appellate memoranda, though the Local Rules of your superior court may dictate the font, type size, margins, etc. to be used. Memoranda must contain "a short statement of the facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal." SCRAP 8(a)(3). Opening and answering memoranda are limited to fifteen pages. SCRAP 8(a)(4). Parties can move to exceed this limit, in appropriate circumstances, under SCRAP 8(a)(5).

F. Extending filing deadlines

If a party cannot finish a brief by the initial deadline, SCRAP 8(b) permits parties to seek additional time to complete memoranda upon a showing of "good cause." Motions for extension are filed in the trial court.

G. Oral argument

Requests for oral argument must be made *in the caption* of the appellate memorandum (i.e., Oral Argument Requested). If requested, the superior court must grant oral argument. SCRAP 11(a).

H. Relief

SCRAP 8(a)(3) advises parties to precisely state in their conclusion the relief they seek. Make sure that the relief you desire remedies the harm suffered. Through SCRAP 12(a) and (b), the superior court possesses broad power to fashion relief. The appellate court may reverse, affirm, or modify the trial court's ruling as appropriate. But the court can also issue ancillary orders "in aid of the proceedings."

I. Motion for rehearing

A party aggrieved by the superior court's decision may file a motion for rehearing within fourteen days after receiving the decision. SCRAP 13(a). The motion must identify "the points of law or fact [that] the movant contends the court has wrongly decided." *Id.*

III. Unauthorized appeals

Sometimes appellants will attempt to file appeals when they have no right to do so (i.e., from a guilty plea, when the notice of appeal is not timely filed, etc.). SCRAP 8(c)(1). The appellate court may dispense with such attempts under SCRAP 8(c). To invoke relief under this rule, a party must file a procedural motion (perhaps captioned, Motion to Dismiss Appeal) in the trial court. The caption must also state, "Procedural Motion—Refer to Superior Court." SCRAP 8(c)(3). Once the opposing party responds, the pleadings are transmitted to the superior court for determination. SCRAP 8(c)(5). All other action in the appeal is suspended pending resolution of the procedural motion. SCRAP 8(c)(4). If the superior court allows the appeal to proceed, it will issue deadlines for appellate memoranda. Those briefs will then be filed in the superior court instead of the trial court.

IV. *Anders* briefs.

Defendants sometimes file what's known as an *Anders* brief, named after the case *Anders v. California*, 386 U.S. 738 (1967). These briefs, filed by the defendant's appellate counsel, raise no arguable issue on appeal but ask the trial court to review the record for reversible error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30 (App. 2000), *rev. denied*. The defendant may then file a supplemental memorandum raising an issue not included in counsel's *Anders* brief. *Id.* If no arguable issue is raised, the superior court reviews only for fundamental error, as no issues have been preserved for appeal. *State v. Flores*, 227 Ariz. 509, 512 ¶ 12 (App. 2011).

Because no substantive issues are raised in *Anders* briefs, the Phoenix City Prosecutor's Office does not file a substantive brief in response. Instead, we file a Notice of Receipt of *Anders* Brief. In it, we inform the court that we received an *Anders* Brief, and that we don't intend to file a substantive response unless ordered to do so by the court after it has reviewed the record.

V. Further review after an LCA

Parties have a limited right to appeal after an LCA. Under A.R.S. § 22-375(A), a party may appeal from the superior court to the court of appeals if the claim "involves the validity of a tax, impost, assessment, toll, municipal fine[,] or statute." This jurisdiction extends only to the facial validity of the tax, impost, assessment, toll, fine, ordinance, or statute. All other claims must be raised by special-action petition in the court of appeals.